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QUESTION OF THE HUMAN RIGHTS OF ALL PERSONS SUBJECTED TO ANY FORM OF DETENTION OR IMPRISONMENT

FURTHER PROMOTION AND ENCOURAGEMENT OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, INCLUDING THE QUESTION OF THE PROGRAMME AND METHODS OF WORK OF THE COMMISSION

Written statement submitted by the Lawyers Committee for Human Rights, a non-governmental organization in special consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1296 (XLIV).

[11 February 1998]

GE.98-10652 (E)

The case of the Special Rapporteur on the independence of judges and lawyers, and the need to strengthen the special procedures system of the Commission on Human Rights

1. The Lawyers Committee for Human Rights expresses its serious concern at the Malaysian Government's failure to ensure the legal immunity of the Special Rapporteur on the Independence of Judges and Lawyers, Mr. Param Cumaraswamy. Four actions for libel and defamation have been brought against Mr. Cumaraswamy in the Malaysian courts. These actions relate to statements he made to the London-based magazine International Commercial Litigation regarding his inquiries into the Malaysian judicial system; over US$ 100 million is being sought in damages. The Lawyers Committee is concerned that the charges brought against the Special Rapporteur (a) violate his immunity under international law, and (b) have the effect of obstructing his continuing ability to conduct his Commission-mandated investigation into attacks on the independence of the judiciary worldwide.

2. In the first lawsuit, Mr. Cumaraswamy petitioned the High Court of Malaysia for immunity from all legal proceedings pursuant to the 1946 Convention on the Privileges and Immunities of the United Nations which states (Section 22):

> "[E]xperts ... performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions ... In particular, they shall be accorded ... in respect of words spoken and written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind."

In support of the petition, he brought to the court's attention a certificate issued by the Secretary-General of the United Nations determining that "the words which constitute the basis of plaintiffs' complaint in this case were spoken by the Special Rapporteur in the course of his mission", and that Mr. Param Cumaraswamy "is immune from legal process". The certificate reiterates Malaysia's legal obligation, under Section 34 of the Convention, to "be in a position under its own law to give effect to the terms of this Convention".

3. The Malaysian Government then issued its own certificate, which confirmed the Special Rapporteur's immunity, but provided for a qualified immunity, limited to statements "only" if they were made in the course of the performance of his mission.

4. On 28 June, 1997 the High Court of Malaysia rejected Mr. Cumaraswamy's petition, ruling that the certificate of the Secretary-General was merely an "opinion"; this ruling is now under appeal. Three other writs were then issued against Mr. Cumaraswamy, all relating to the original article. In light of the four suits currently pending against him, and the high financial risk involved, the Special Rapporteur has felt compelled to resign as executive partner of his law firm - which he founded - in Malaysia.

5. The approach taken by the Malaysian courts is also in sharp contrast to that of, for example, courts in the United States, which have routinely recognized the immunity of international organizations, their staff and officials, in cases arising from the presence of the United Nations Secretariat in New York and the Organization of American States Secretariat in Washington. 1/ By allowing its national courts to determine the scope of Mr. Cumaraswamy's immunity, the Malaysian Government is in breach of its obligation under the Convention to give effect to the rapporteur's immunity from any legal process in Malaysia.

6. The Convention gives the International Court of Justice exclusive authority over the settlement of any difference arising out of the implementation of the Convention: "[a]ll differences arising out of the interpretation or application of the present convention shall be referred to the International Court of Justice, unless in any case it is agreed by the parties to have recourse to another mode of settlement. If a difference arises between the United Nations on one hand and a Member on the other hand, a request shall be made for an advisory opinion on any legal question involved ...". Under established principles of international law, it is for the International Court of Justice, and not the Malaysian courts, to resolve Mr. Cumaraswamy's situation.

7. Given the seriousness of this ongoing situation, the Lawyers Committee calls upon the Commission on Human Rights, and in particular on the States parties to the Convention on the Privileges and Immunities of the United Nations, to take immediate and appropriate steps to establish Mr. Cumaraswamy's immunity from any legal process in Malaysia.

Special procedures of the Commission on Human Rights

8. The actions against the Special Rapporteur on the independence of judges and lawyers raises serious concerns about a wider pattern of interference with the work of special rapporteurs and working groups of the Commission on Human Rights. Other incidents which occurred in 1997 were the non-cooperation of President Laurent Kabila with the United Nations human rights investigative

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1/ See, e.g., DeLuca v. United Nations Org., in which the court held that the United Nations and its officials enjoy "immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity ... Properly invoked immunity shields the defendant not only from the consequences of litigation's results, but also from the burden of defending themselves" [841 F. Supp. 531, 533 (S.D.N.Y. 1994), aff'd, 41 F.3d 1502 (2d Cir. 1994)]. See also, the court's comment in Broadbent v. Organisation of American States. "Denial of immunity opens the door to divided decisions of the courts of different member States passing judgement on the rules, regulations and decisions of international bodies. Undercutting uniformity ... would undermine the ability of the organization to function effectively." In this case, the court held that as the OAS had not waived its immunity, the plaintiff's claim had to be dismissed [628 F.2d (D.C. Cir. 1980)].

team and his personal attacks on Mr. Roberto Garretón, the Special Rapporteur on the Democratic Republic of the Congo, and the amendments made to the report of the Special Rapporteur on contemporary forms of racism, Mr. Maurice Glèlè-Ahanhanzo, as a result of Government pressure.

9. The Lawyers Committee for Human Rights emphasizes that the special procedures of the Commission on Human Rights play a crucial role in monitoring human rights situations around the world, calling public attention to human rights violations and preventing their further occurrence. The Commission on Human Rights has a responsibility to ensure that the special procedures experts enjoy full freedom and independence in giving effect to their respective mandates, guided by relevant resolutions and established practices among special rapporteurs and independent experts. In order to carry out their work independently and effectively, their immunity as United Nations experts must be fully protected.

10. The Lawyers Committee expresses great concern about two resolutions that were introduced during the fifty-third session of the Commission on Human Rights (E/CN.4/1997/L.86 and E/CN.4/1997/L.87), aimed at "rationalizing" the current special procedures system. If adopted in their current form, these resolutions would seriously undermine the independence and effectiveness of the special procedures system by requiring, for example, that special rapporteurs on mission "refrain from giving media publicity to their findings until these have been considered and deliberated upon by the Commission", and by instituting an unprecedented consensus requirement for the establishment of any country related mandate.

11. The Lawyers Committee for Human Rights believes that any review of the special procedures system should aim to strengthen, not weaken, the current system. In particular, we urge all States:

(i) To reiterate the importance of the independence and discretion of all experts in carrying out their mandate, as established by the Commission on Human Rights. This includes any public explanation of their mandate and activities, such as made during conferences and media interviews. States should guarantee the immunity from legal process of all experts on mission, as provided for in the Charter of the United Nations and the 1946 Convention on the Privileges and Immunities of the United Nations.

(ii) In appropriate circumstances, to invite experts to conduct on-site visits where they have indicated their interest in doing so. States should facilitate these missions and, in particular, allow unhindered access to any place of detention or imprisonment, any sites of alleged massacres or other human right abuses, as well as meetings with senior government officials, and confidential meetings with any detainee, NGO representative, victim or family member.

(iii) To implement fully the conclusions and recommendations of special procedures experts as expressed in their reports. States should cooperate with and respond to any communication by a rapporteur or working group on alleged violations and to requests for further

clarification. States should provide these experts with the results of any investigation, prosecution or conviction on communicated violations in a timely manner.

(iv) To request the Office of the United Nations High Commissioner for Human Rights to conduct a survey on the needs of special procedures experts, in particular as they relate to well-qualified assistance, research capacity, adequate resources and State cooperation.